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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 423

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ET AL.,
Petitioners,

vs.

GEORGE D. HORNING, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN PAUL JONES,
Counsel for Petitioners,

JAMES V. CONNELLY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ALVINA V. McALEENAN, KATHERINE McALEENAN FAGAN, MARGERY McALEENAN O'SULLIVAN, KENNETH K. McALEENAN AND THERESA R. HAGGERTY, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF "McALEENANS,"
Petitioners,

vs.

GEORGE D. HORNING, INCORPORATED, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioners, Arthur McAleenan, Henry J. McAleenan, H. Alvin McAleenan, Alvina V. McAleenan, Katherine McAleenan Fagan, Margery McAleenan O'Sullivan, Kenneth K. McAleenan and Theresa R. Haggerty, co-partners, do ing business under the firm name and style of "McAleenans," respectfully petition this honorable court to grant a writ of certiorari to review the opinion and judgment of

the United States Circuit Court of Appeals for the Fourth Circuit decided and filed on May 12, 1945 (R. 116), in this case lately pending in said Circuit Court of Appeals, entitled "George D. Horning, Incorporated, a corporation, defendant appellant, v. Arthur McAleenan, et al., etc., Copartners Doing Business Under the Firm Name and Style of 'McAleenans,' plaintiff appellee," being cause No. 5343 on the docket of said Circuit Court of Appeals, reversing a judgment of the District Court of the United States for the Eastern District of Virginia (Alexandria Division), in said cause, in favor of your petitioners against the respondent herein.

Statement of the Matter Involved

The action was brought in the District Court by the petitioners, as plaintiffs, against the respondent, as defendant, to recover the sum of $17,000.00 loaned by the plaintiffs on July 8, 1941.*

The complaint contained nine causes of action, five of which (Nos. 1, 2, 3, 4 and 7) sounded in tort, and were, basically, actions against the defendant for fraud and deceit. To these five causes of action the defendant plead either the statute of limitations or the statute of frauds.

The remaining four causes of action sounded in contract and were as follows:

5. For money borrowed jointly by the defendant and one Mrs. Margaret Boyle.

6. For money lent to the defendant.

8. For money paid to the defendant.

9. For money, property of the plaintiffs, had and received by the defendant.

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* The petitioners will hereafter be referred to as the "plaintiffs," and the respondent as the "defendant."

In order to dispose of the questions of law raised by the pleas of the statute of limitations and the statute of frauds, and reach an early trial, the plaintiffs and the defendant entered into a stipulation, dated May 25, 1944, whereby the plaintiffs, with the express consent of the defendant, withdrew causes of action Nos. 1, 2 and 4.

The cause proceeded to trial before a jury on June 15, 1944, and required two days to try.

At the close of plaintiffs' case, defendant moved to strike out "all of the testimony of Mr. McAleenan and all the other witnesses, Blauweiss and Kelly, with reference to an alleged custom in the trade as to the meaning and vernacular in the street of the expression "O. K."

This motion was denied by the court (Tr. 178, 179).[1]

The defendant then moved the court for a directed verdict "on each of the causes of action that have been retained in the case, severally * * *" (Tr. 179).

This motion, likewise, was denied by the court. (Tr. 197, 198.)

Thereupon, the defendant proceeded with its case and produced witnesses for and in its behalf. (Tr. 199-327.)

At the close of all the evidence, and while the instructions for the jury were under consideration by the trial judge, the plaintiffs, without objection by the defendant, and with the assent of the court, withdrew the 3rd (Tr. 387) and 7th (Tr. 389) causes of action, and elected to go to the jury on the four remaining causes of action above enumerated. (Tr. 390.)

The court granted Instructions Nos. 1, 4, 7 (as modified), and 12 (as finally modified), and the defendant excepted as to each. (Tr. 384.)

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[1] Reference to the transcript of record in this court is designated by the letter "R".

Reference to the transcript of the testimony in the trial is designated "Tr."

The defendant then renewed its motion for a directed verdict, severally, as to the respective causes of action that are set forth in the amended complaint. (Tr. 336.) These motions were again denied. (Tr. 384, 388, 390, 391.)

The case was submitted to the jury following the charge by the court (Tr. 394-400), and the jury returned a "unanimous" verdict for the plaintiffs in the sum of $17,000.00 with interest at six per cent from January 1, 1943, to date. (Tr. 402-406.)

Thereafter, the defendant filed a motion to set aside the verdict of the jury and the judgment entered thereon and to enter judgment for the defendant; or, in the alternative, for a new trial.

Pursuant to argument had on the motion of the defendant, the District Judge filed a memorandum denying the motions of the defendant (R. 8-18) and entered an order overruling the motions of the defendant for the reasons stated in his written memorandum (R. 19, 20).

The defendant thereafter perfected its appeal to the United States Circuit Court of Appeals for the Fourth Circuit and the cause came on to be heard on March 16, 1945, before Parker, Soper and Dobie, Circuit Judges, and was submitted (R. 115). Supplemental briefs were requested by the court and filed. (R. 115.)

On May 12, 1945, the Circuit Court of Appeals filed its opinion and reversed and remanded the case to the District Court with direction that judgment be entered for the defendant (R. 116-126).

Thereafter, a petition for rehearing and reargument and stay of mandate was filed for the plaintiffs and presented on June 11, 1945, and on June 12, 1945, the Circuit Court of Appeals denied a rehearing.

Jurisdiction of This Court

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A. Sec. 347(a).

Questions Presented

1. Whether the evidence adduced at the trial in the District Court, with the inferences fairly and reasonably arising therefrom, was sufficient to warrant the submission to the jury of the issues.

2. Whether the evidence adduced constituted substantial evidence to take said issues to the jury.

3. Whether, by the opinion and judgment of the Circuit Court of Appeals, plaintiffs were denied their constitutional right to have a jury pass upon the facts in the case.

Reasons for Granting Writ

1. The United States Circuit Court of Appeals for the Fourth Circuit, by its said opinion and judgment in this cause, has denied the petitioners the right to have the judgment of a jury on the questions of fact presented at the trial before the District Court of the United States for the Eastern District of Virginia (Alexandria Division).

2. The United States Circuit Court of Appeals for the Fourth Circuit invaded the province of the jury.

3. The United States Circuit Court of Appeals for the Fourth Circuit had no authority to reverse the judgment of the District Court and remand this cause to that court with direction that final judgment be entered for the defendant.

Prayer

Wherefore, the petitioners respectfully pray that:

1. A writ of certiorari be issued by this honorable court directed to the United States Circuit Court of Appeals for the Fourth Circuit for the review by this court of its said opinion and judgment.

2. Upon such review, the judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed.

3. Petitioners may have such other relief as this honorable court may deem appropriate.

Respectfully submitted,

JOHN PAUL JONES,
Counsel for Petitioners.

Of Counsel:
JAMES V. CONNELLY.